No. 80-429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Are claims of intentional gender-based wage discrimination, which do not meet the equal work standard of the Equal Pay Act, 29 U.S.C. § 206(d), actionable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1 to 2000e-17?

PARTIES TO THE PROCEEDINGS BELOW

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v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents Alberta Gunther, Velene Vallence, Marion Vander Zanden and Yvonne Hatton were jail matrons employed by Washington County, Oregon.

As matrons, their principal responsibilities were to process and guard female prisoners. On occasion, respondents transported prisoners, assisted in arrests, and processed records. They also performed duties relating to male inmates, including booking them in, taking mug shots, and fingerprinting.

Respondents' male counterparts in the jail performed essentially the same functions as matrons, but only with respect to male prisoners. Until June 1973, respondents' male counterparts were deputy sheriff recruits who were assigned to the jail on a temporary rotating basis. Deputies were paid between $668 and $853 per month, and recruits received monthly salaries ranging from $636 to $736, while the respondents were paid from $476 to $606 per month for their work. (Dist.

Ct. Opinion at 4.) This unequal compensation of matrons and male corrections officers was contrary to the practice in other counties in the Portland metropolitan area where male and female corrections personnel received equal wages.

Beginning in June 1973, deputies and recruits were phased out of jail duties and replaced by "corrections officers," a newly created position. The official job descriptions for matron and corrections officer were identical and incumbents were required to take the same civil service exam and complete the same classroom training.

On January 1, 1974, the salary range for matrons was $525 to $668 per month, and the salary range for corrections officer was $701 to $896 per month. Six months after respondents were terminated, corrections officers with at least two

years of experience became senior corrections officers at a salary range of $812 to $1,036 per month. The average experience of the matrons at the time of their termination was 4.3 years. (Def. Ex. 1.)

In the spring and summer of 1973, the respondent matrons unsuccessfully pressed requests for equal pay with the County and the Washington County Police Officers Association, the bargaining unit for county jail employees. Sheriff Barnes had long believed that the matrons were undercompensated and had, in 1972, recommended a substantial wage increase which would have brought the matrons almost to parity with male corrections personnel. The Civil Service Commission rejected this unilateral request because salary levels were to be fixed through collective bargaining between the County and

the Police Officers Association. When the matrons requested the union, which had only eight female members, to negotiate for higher pay, union officials told them to "cool it." (Gunther Depo. at 20; Hatton Depo. at 6-7.)

A few months after the matrons requested equal pay, Washington County closed the women's jail, boarded out its female prisoners in an adjoining county's facilities, and terminated the respondent matrons' jobs. Two other matrons, who had not sought equal pay, were transferred to other positions with the jails. At the time of respondents' discharge, the defendant sheriff completed personnel forms on which he stated that he would not rehire them. The respondents' subsequent efforts to secure reemployment with the County were unsuccessful.

The respondents then filed this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1--2000e-17 (1976), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976). They alleged, generally, that the defendant County and officers had denied them equal pay for substantially equal work, that even if their work was not the substantial equivalent of that performed by the deputy sheriffs and corrections officers, some element of the disparity in compensation was solely attributable to discrimination on the basis of sex, and that the defendants had terminated and refused to rehire them in retaliation for their equal pay requests.

The district court, after severely restricting presentation of evidence supporting plaintiffs' claims, entered judgment for the defendants.

The court found that the matrons' work was not substantially equal to that performed by deputies and corrections officers and concluded that this resolution of the equal pay issue precluded further consideration of the alternative discriminatory compensation claim. The trial court also rejected respondents' retaliatory discharge claims.

The Court of Appeals for the Ninth Circuit affirmed the district court's disposition of the equal work and retaliatory discharge questions as not clearly erroneous. The court held, however, that the Equal Pay Act's equal work standard did not govern respondents' Title VII claim that differences in the compensation of male and female corrections personnel were, at least in part, attributable to sex discrimination. Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979).

The panel found that under the Bennett Amendment, 42 U.S.C. § 2000e-2(h), the Equal Pay Act's four affirmative defenses were incorporated into Title VII, but its equal pay formulation was not adopted as the controlling substantive standard for all wage discrimination claims under the Civil Rights Act.[1] Accordingly, while

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[1] The Bennett Amendment provides as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate on the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provision of § 206(d) of Title 29.

The full text of § 703(h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(h) (1976), is reproduced in the appendix to this brief.

The Equal Pay Act includes the following affirmative defenses: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or

equal pay claims under Title VII or the Equal Pay Act are tested against identical criteria, Title VII's broad remedial mandate affords relief for discriminatory compensation, even when claimants cannot establish substantial equality of employment. The court instructed the district court on remand to consider evidence of intentional sex discrimination in fixing the matrons' compensation.

The defendant County subsequently petitioned for rehearing. The appellate panel, in denying that petition, filed a supplemental opinion which comprehensively analyzed the interrelationship of the Equal Pay Act and Title VII. The court

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1 (cont'd)

quality of production; or (iv) a differential based on any other factor other than sex." The full text of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976), is included in the appendix to this brief.

emphasized that is was not substituting a "comparable" work test for the "equal" work standard, and that a Title VII plaintiff could not establish a prima facia case solely by alleging that her job requirements were comparable to those of similarly situated males. 623 F.2d at 1321. The court of appeals simply recognized a right of recovery under Title VII for claimants who demonstrate that they have been undercompensated because of intentional gender-based discrimination.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination with regard to "compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a) (1964). This is a remarkable, sweeping enactment, reflecting congressional determination

to erradicate discrimination in the work-place and to remedy injuries resulting from past discrimination. Albemarle Paper Company v. Moody, 422 U.S. 405, 421 (1975).

The petitioners urge the Court to sound retreat from this historic mandate. They contend that Congress, in approving a "technical correction" of Title VII, intended to sanction intentional gender-based wage discrimination in all cases not meeting the Equal Pay Act's equal work standard. The court of appeals properly rejected this position as inconsistent with Title VII's intent and as contrary to the Bennett Amendment's plain language, its legislative history, and its subsequent administrative interpretation and application.

Before applying the tools of statutory interpretation in defense of

the Ninth Circuit's holding, it is essential to define the nature and scope of that result. Petitioners invoke the spectre of "comparable worth," intimating that the minions of the EEOC would be loosed across the economic landscape, engaged in an endless quest of job comparison. The court of appeals did not sanction such a result. Nor do respondents espouse that result. The Ninth Circuit emphasized that a simple comparison of jobs and compensation would not state a prima facie case under Title VII. Rather, plaintiffs must present some additional evidence, proving discriminatory intent. This requirement of proof of intent or motive is common to all disparate treatment cases under Title VII. See International Brotherhood of Teamsters v. United States, 432 U.S. 324, 335 n.15 (1977); Equal Employment Opportunity

Commission Interpretive Manual 37-38 (1972).[2] Petitioners' policy-oriented concerns are unfounded; comparable work alone is not enough.

The court of appeals' construction of the Bennett Amendment as incorporating only the Equal Pay Act's four affirmative defenses is supported, indeed compelled, by the plain meaning of the statutory language. The Bennett Amendment permits gender-based differentiations in compensation if such differences are "authorized" by the provisions of the

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[2] Petitioners implicitly criticize the court of appeals for remanding for proof of discrimination under "unspecified standards." The terms of the remand were, however, consistent with this Court's practice in Title VII appeals of defining the limits of causes of action while leaving evidentiary "fine-tuning" to the trial courts. E.g., Albemarle Paper Company v. Moody, 422 U.S. 405, 422 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). The issue before the court of appeals, and now before this Court,

Equal Pay Act. Discrimination in compensating employees of different sexes who perform equal work is "authorized"--in its clearest sense, positively sanctioned--only if it is attributable to seniority, merit, output, or some factor other than sex. 29 U.S.C. § 206(d)(1). Petitioners' reading of "authorized" as "not prohibited by" is tortured and unpersuasive. The authorization language of the Bennett Amendment reflects a legislative intent to incorporate the Equal Pay Act's four affirmative defenses, not to adopt equal work-equal pay as the sole measure of wage discrimination under Title VII.

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2 (cont'd)

was whether claims of intentional discrimination which would not satisfy the Equal Pay Act's requirements are actionable under Title VII. The Ninth Circuit decided that issue and, properly, declined to speculate on what evidence of intentional discrimination might be sufficient to prove respondents' claims.

The legislative history of the Bennett Amendment is ambiguous. However, statements by Senators Bennett and Dirksen at the time the amendment was introduced seem to support the "four defenses" approach endorsed by the Ninth, Tenth, Third, and Fourth circuits.[3] The context in which the amendment was introduced, as a "technical correction" after cloture had been invoked, also supports a restrictive reading. Petitioners' reliance on Senator Bennett's characterization of the amendment, a year after its adoption, is unavailing. Not only is non-contemporaneous legislative history highly suspect, but the Senator's remarks were confusing and internally inconsistent.

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[3] Gunther v. County of Washington, 602 F.2d 882 (1979), reh. denied, 623 F.2d 1302 (9th Cir. 1980); Fitzgerald v. Sirloin Stockade, 624 F.2d 945, 953-54 & n.2 (1980); I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (4th Cir. 1980); EEOC v. Aetna Insurance Co., 616 F.2d 719, 724 n.5 (1980).

Administrative interpretation and application of the Bennett Amendment, after a period of initial confusion, espoused the "four defenses" view. The EEOC's original 1965 regulations do not "flatly" contradict its 1972 guidelines; indeed, the 1972 regulations simply reflect an explicit endorsement of the approach followed in the great majority of decisions under the original guidelines. Accordingly, the administrative endorsement of the "four defenses" construction is entitled to great deference.

The Ninth Circuit's holding is consistent with the considered authority of other courts of appeals. Contrary to petitioners' assertion, only two other appellate courts, the Third and Tenth Circuits, have squarely considered whether claims of intentional discrimination in

compensation which do not allege substantial equality of work are cognizable under Title VII. Those courts resolved the issue consistently with the Ninth Circuit's holding.[4]

Only four other courts have explicitly addressed the relationship between Title VII and the Equal Pay Act under the Bennett Amendment. Panels within the Fourth Circuit appear to have resolved the issue inconsistently.[5] The Tenth Circuit has held that a simple comparable work claim which does not allege intentional discrimination is not

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4 I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (4th Cir. 1980); Fitzgerald v. Sirloin Stockade, 624 F.2d, 945, 953-54 n.2 (1980).

5 Compare EEOC v. Aetna Insurance Co., 616 F.2d 719 724 (4th Cir. 1980) (citing Gunther) with Stastny v. Southern Bell Telephone and Telegraph Co., 625 F.2d 267, 281 (4th Cir. 1980).

actionable under Title VII.[6] And the District of Columbia Circuit has endorsed the "four defenses" approach in dictum.[7]

Finally, the court of appeals' reading of the Bennett Amendment is consistent with, and perhaps buttressed by, principles of in pari materia. That canon of construction is applied to "harmonize" the operation of statutes dealing with similar subject matter so that the application of one does not nullify the provisions of the other. 2A J. Sutherland, Statutes and Statutory Construction, §§ 51.02-51.05 (C. Sands, 4th ed. 1973) (henceforth cited as "J. Sutherland").

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6 Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 49 U.S.L.W. 3250 (U.S. Oct. 6, 1980).

7 Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

In this case, because of substantial differences in statutory coverage, recognition of nonequal work claims under Title VII does not nullify the Equal Pay Act. For example, plaintiffs who cannot recover under a Title VII disparate treatment claim because of an inability to prove discriminatory intent may prevail under the Equal Pay Act upon a simple showing of equal work and unequal pay. Conversely, adoption of the equal work formulation as the exclusive substantive standard for Title VII claims would render Title VII's provisions regarding gender-based wage discrimination a nullity. The Ninth Circuit's holding, consistent with in pari materia principles, reconciles the statutes and avoids this result.

ARGUMENT

I. THE COURT OF APPEALS' CONSTRUCTION OF THE BENNETT AMENDMENT IS CONSISTENT WITH THE INTENT OF TITLE VII.

The Ninth Circuit's reading of the Bennett Amendment produces the only result which is consistent with the broad remedial purpose of Title VII. If, as petitioners suggest, the Bennett Amendment limits Title VII's coverage of pay claims to situations in which plaintiffs can show equal work, employers would be free to pay employees in "female" job categories less solely because they are women. Title VII clearly bars this type of intentional wage discrimination on the basis of race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a). The essential inquiry in interpreting the Bennett Amendment is whether Congress, contrary to the general mandate of the

Civil Rights Act, intended to insulate such discrimination against women.

Petitioners' broad reading of the Bennett Amendment conflicts with settled principles of statutory construction and is contrary to this Court's direction in interpreting Title VII. Remedial measures, including civil rights legislation, are to be "liberally construed in order that their beneficent objectives may be realized to the fullest extent possible." 4 J. Sutherland, supra, § 72.05. Conversely, exceptions such as the Bennett Amendment, which limit the sweep of such statutes, are to be narrowly construed. E.g., Piedmont and Northern R. Co. v. ICC, 286 U.S. 299, 311-12 (1932).

This Court has repeatedly invoked these principles in Title VII cases, emphasizing the breadth of the statute's mandate. Justice Stevens' observations

in Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), are exemplary:

> It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals or for paying them less.

435 U.S. at 707 (footnotes omitted). See, e.g., Frank v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).[8]

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[8] In Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court cited with approval, the following language from Sprogis v. United Air Lines, Inc., 444 F.2d, 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971):

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1)

Petitioners' construction of the Bennett Amendment would severely limit Title VII's protections against sex-based wage discrimination. Currently, more than 20 percent of all female workers are employed in job classifications that are 95 percent or more female; more than three-fourths of women workers are in positions which

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8 (cont'd)

subjects to scrutiny and eliminates such irrational impedements to job opportunity and enjoyment which have plagued women in the past.

435 U.S. at 707 n.13. See generally Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. Mich. J. L.-Ref. 399, 458 n.222 (Spring 1979) (hereinafter cited as "Blumrosen").

are 75 percent female.[9] Significantly the respondent-matrons in this case held positions which, by statute, were limited to female incumbents.[10] For these women, the lack or absence of male referrents in their job classifications makes it virtually impossible to prove equal work. They would be effectively foreclosed from relief for intentional wage discrimination if the Bennett Amendment were viewed as imposing "equal work" as the sine qua

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[9] See U.S. Bureau Labor Statistics, Department of Labor, Employment and Earnings at Household Data Annual Averages (January 1980). Compare Comment, The Bennett Amendment-Title VII and Gender-Based Discrimination, 68 Geo. L. R. 1169, 1187 n.155 (1980) with Blumerosen, 12 U. Mich. J. L.-Ref. at 400 n.3. Cf. Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 185 (7th Cir. 1979) (finding Title VII violation although plaintiff "presented no evidence comparing the job she held with that held by any male").

[10] Under Oregon law, female inmates must be attended by other women. ORS §§ 137.350, 137.360.

non. of claims for gender-based wage discrimination under Title VII. So viewed, Title VII would discriminate among women, affording a remedy for wage discrimination to women holding positions with a substantial number of male incumbents, but denying such relief to women less fortuitously employed. Indeed, the Title VII plaintiffs in Los Angeles Department of Water & Power v. Manhart, supra, and General Electric Co. v. Gilbert, 429 U.S. 125 (1976), might well have been precluded from raising their claims under such a standard.

Petitioners' "exclusive standard" position would attribute to Congress an intent to treat intentional sex-based wage discrimination differently than similar discrimination on the basis of race, color, religion, or national origin. It is undisputed that non-gender related

wage discrimination is actionable under Title VII without showing equal work. See I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094, 1099-1100 (4th Cir. 1980), cert. filed, _____ U.S.L.W. _____, (1980). Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), is illustrative. There, the court engaged in extensive evaluation of "comparable" "black" and "white" job classifications, in determining that two black Title VII plaintiffs were entitled to recover for racially motivated wage discrimination. 279 F. Supp. at 509-10. Petitioners would deny women who were victims of intentional wage discrimination the relief afforded plaintiffs in Quarles.

The Bennett Amendment, as construed by petitioners, would rend the fabric of Title VII, opening two substantial gaps in its protective coverage.

First, only a fraction of the female work force--those employed in job classifications with a significant number of male incumbents--would be able to recover for intentional wage discrimination. Second, women would be afforded less protection against wage discrimination than any other disadvantaged group.

If petitioners' characterization were valid, if Congress did, indeed, intend to so substantially qualify the remedial mandate of the Civil Rights Act, one would reasonably expect that the Bennett Amendment would have been extensively discussed and vigorously debated. But that was not the case. Indeed, the circumstances surrounding the amendment's introduction and adoption indicate that Congress regarded it as of limited significance.

Senator Bennett introduced his amendment as a "technical correction"

after cloture had been imposed. 110 Cong. Rec. 13647 (1964). Designation of the amendment as a "technical correction" indicates its limited purpose. Floor debate, while concededly ambiguous, was brief, and certainly not heated.[11] It is most unlikely that the Senate leadership would have allowed introduction of the amendment after imposition of cloture had it believed that the proposal would effect substantial changes in the coverage of the Civil Rights Act.

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[11] The tone and extent of debate regarding the Bennett Amendment stands in sharp contrast to that concerning other proposals to significantly limit Title VII's coverage. See 110 Cong. Rec. 2550 (1964) (amendment extending bona fide occupational qualification to race and sex); 110 Cong. Rec. 2778 (1964) (amendment to limit coverage to instances in which discrimination based "solely" on prohibited classification). See Blumrosen, 12 U. Mich. J. L.-Ref. at 480-81.

Congress did not intend to discriminate against women within the provisions of Title VII.

II. THE LANGUAGE OF THE BENNETT AMENDMENT REFLECTS A LIMITED INTENT TO INCORPORATE THE EQUAL PAY ACT'S FOUR AFFIRMATIVE DEFENSES.

The Bennett Amendment permits gender-based differentiations in compensation if such differences are authorized by the provisions of the Equal Pay Act. "Authorize," in its ordinary sense means "[t]o empower, to give a right or authority to act." Black's Law Dictionary 122 (5th ed. 1979). Applying this definition, the only provisions of the Equal Pay Act which affirmatively sanction disparities in wages are its four affirmative defenses. Although petitioners urge the Court not to "make a fortress out of the dictionary," inquiry into the statute's meaning must begin with this definition. Lewis v.

United States, 445 U.S. 55, 60 (1980) (and cases cited therein).

Petitioners suggest, as an alternative definition, that "authorize" means "not to prohibit."[12] Thus, because the Equal Pay Act does not prohibit discrimination in cases of nonequal work, it "authorizes" such discrimination. Not only is this reading contrived and tortured,[13] but it is contrary to the

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12 Petitioners, with a note of triumphant discovery, support their converse definitional approach by invoking a definition of "authorize" as "to permit a thing to be done in the future." Black's Law Dictionary 169 (4th ed. 1968). This merely restates, rather than resolves, the question: the key is the meaning of "to permit."

13 Cf. Chandler v. Roudebush, 425 U.S. 840, 848 (1976):

> [T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

premises of our constitutional system:

> Governmental authorization is not necessary to engage in the ordinary economic and social activities of life. The concept of our government as one of limited powers presupposes a freedom of action in the absence of governmental regulation rather than an ability to act only with permission or authorization from the government.

Blumrosen, 12 U. Mich. J. L.-Ref. at 482.

Petitioners' contention that a normal construction of the Bennett Amendment's authorization language would render the amendment a nullity is similarly unavailing. Because § 703 included three of the four Equal Pay Act affirmative defenses before the Bennett Amendment was adopted, petitioners reason, the amendment would have no independent meaning if its effect was only to incorporate the Equal Pay Act's defenses.

This argument is flawed in two respects. First, under a "four defenses" construction, the amendment has discrete

significance. The inclusion of the fourth Equal Pay Act defense, "a differential based on any factor other than sex," is not, as petitioners suppose, some "meaningless" make-weight which "hardly needed to be added to Title VII." Petitioners' Brief at 74. Indeed, this fourth defense was the focus of this Court's analysis in Los Angeles Department of Water & Power v. Manhart, supra. Cf. Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (significance of fourth affirmative defense in Equal Pay Act action). The Bennett Amendment also insured consistent interpretation and application of defenses in equal pay actions brought under either the Equal Pay Act or Title VII, harmonizing the statutes and eliminating the possibility that employees would be subject to conflicting regulations. See, I.U.E. v. Westinghouse Electric Corp.,

631 F.2d at 1101. So viewed, the Bennett Amendment is much more than mere surplusage. Comment, The Bennett Amendment--Title VII and Gender-Based Discrimination, 68 Geo. L. J. 1169, 1188 (1980).

Conversely, petitioners' inclusive reading of the statutory authorization language would make Title VII's prohibition of gender-related wage discrimination virtually meaningless. If the Equal Pay Act describes the exclusive substantive standards for actions for sex-based wage discrimination, then Title VII's proscription of such discrimination becomes cumulative and essentially superfluous.[14] However, as petitioners' brief emphasizes,

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[14] Indeed, Title VII, by imposing the additional element of intent in disparate treatment cases, might, under petitioners' approach, be regarded as having narrowed the protection against wage discrimination.

"[a] statute should be construed so that effect is given to all its provisions, so that no part is inoperative or superfluous, void or insignificant." 2A J. Sutherland, supra, § 46.06. This rule of construction is particularly compelling when applied to employment discrimination measures because Congress has followed a practice of affording complementary and supplementary remedies in that area. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). The court of appeals' reading of the Bennett Amendment conforms to these principles.

III. THE LEGISLATIVE HISTORY OF THE BENNETT AMENDMENT, WHILE AMBIGUOUS, GENERALLY SUPPORTS THE "FOUR DEFENSES" CONSTRUCTION.

Legislative commentary concerning the Bennett Amendment is, at best, murky. The most plausible reading of the limited legislative history, however, is that in areas of overlap between

Title VII and the Equal Pay Act--equal pay actions under Title VII--Congress intended the Equal Pay Act's affirmative defenses, with corresponding judicial and administrative interpretations, to apply.

Contemporaneous comments by Senators Bennett and Dirksen correspond with the "four defenses" construction. Senator Bennett, in introducing the amendment, noted the possibility of "conflict" between Title VII and the Equal Pay Act and stated that the purpose of his "correction" was "to provide that in the event of conflict, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13647 (1974). Contrary to petitioners' contentions, the court of appeals' reading of Title VII does not "nullify" the Equal Pay Act in areas of

overlap. The zone of statutory intersection or "conflict" is limited: claims of discrimination in compensation for equal work. The Bennett Amendment insures that when such discrimination is alleged in a Title VII action, Equal Pay Act standards will govern.

Senator Dirksen's statements reflect a clear understanding that the Bennett Amendment's purpose was limited to incorporating the Equal Pay Act's defenses:

> We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> All that the pending amendment does is recognize those exceptions that are carried in the basic Act.

110 Cong. Rec. 13647 (1964)(emphasis added). The "exceptions" to which Senator Dirksen referred were the Equal Pay Act's four affirmative defenses. Petitioners suggest

that Senator Dirksen may have been referring to the exemptions from coverage under the Fair Labor Standards Act, including exemption of "white collar" workers, 29 U.S.C. § 213, and that he viewed the Bennett Amendment as limiting Title VII's wage discrimination protections to employees within the coverage of the Fair Labor Standards Act. Neither the courts nor the EEOC have, however, ever given the Bennett Amendment such a construction. Moreover, it may be reasonably assumed that had Senator Dirksen's colleagues attributed the same significance to his remarks that petitioners do, had they believed the Bennett Amendment so drastically limited Title VII's protections, legislative commentary on the "technical correction" would have been more extensive --and more revealing.

Petitioners cite statements by Senator Clark and Representative Celler as supporting an "exclusive standard" construction. These comments, however, are ambiguous and internally inconsistent. Senator Clark, answering an "unfounded" objection that Title VII's sex discrimination provisions extended "far beyond the scope and coverage of the Equal Pay Act" and did not include "the limitation in that act with respect to equal work on jobs requiring equal skills in the same establishments," offered the following response:

> The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.

110 Cong. Rec. 7217 (1964) (emphasis added). This statement is significant in three respects. First, Senator Clark's observation that the Equal Pay Act's coverage and exemptions differ from those of Title VII implicitly supports a conclusion that equal work was not to be the exclusive standard for wage discrimination actions under Title VII.[15] Second, petitioners assert that because Senator Clark's purpose was to respond to unfounded criticisms, his comments must support the converse construction of the statutes; that is, if the objection that Title VII did not include the "equal work" standard was "unfounded," the statute must incorporate that standard. This characterization of Senator Clark's "answers"

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13 See Gitt and Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy. Univ. Chi. L. J. 723, 746-47 (1977) (hereinafter cited as "Gitt and Gelb").

is not necessarily valid. Certainly, Senator Clark's comments regarding the scope of Title VII did not respond to the criticism that Title VII's coverage extended beyond that of the Equal Pay Act. Certainly, that objection was not unfounded. Finally, even if Senator Clark's remarks regarding incorporation of the equal work standard were responsive, they were, at best, an ambiguous response. The conclusion that Equal Pay Act standards "are applicable to the comparable situation under Title VII" is consistent with either a "four defense" or an "exclusive standard" construction.

Representative Celler's comments are of similarly limited value. In presenting the amended Civil Rights Act to the House of Representatives, Representative Celler stated that the Bennett Amendment:

> provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex--Section 703(b).

110 Cong. Rec. 15896 (1964).[16] This statement must be discounted as inaccurate. Either Representative Celler misapprehended the significance of the Bennett Amendment or oversimplified its meaning for explanatory purposes.

Compliance with the Fair Labor Standards Act would not satisfy "the requirement of the title barring discrimination because of sex." Title VII prohibits a range of discriminatory conduct, including discrimination in hiring, promotion, transfer, and discharge, which does not fall within the terms of the Equal Pay

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16 Representative Celler's reference to Section 703(b) must be regarded as a misstatement. It may be assumed, reasonably, that he was referring to the general prohibitions of Section 703(a).

Act. 42 U.S.C. § 2000e-2 (1976). Petitioners contend that Representative Celler did not need to specify that the Bennett Amendment applied only to discrimination in compensation because the amendment, by its terms, makes that clear. Even under this view, however, Representative Celler's remarks were inaccurate. While the Equal Pay Act applies only to payment of wages, Title VII prohibits discrimination with respect to other forms of compensation. Cf. Los Angeles Department of Water & Power v. Manhart, supra (discrimination in pension fund assessment). Most importantly, the coverage of the two statutes differs dramatically. While Title VII applies to employees of an "industry affecting commerce", 42 U.S.C. 2000e(b), the Equal Pay Act has a much narrower scope, covering only employees "engaged in commerce or in the production

of goods for commerce," 29 U.S.C. § 203 (1976). Exemptions are also substantially different. Accordingly, if Representative Celler's remarks are to be given any meaning, it must be that Equal Pay Act standards govern when equal work-equal pay claims are brought under Title VII.

Petitioners also rely on statements by Senator Bennett in 1965, a year after the enactment of Title VII. Senator Bennett presented a law review article and an accompanying memorandum prepared by his staff in an attempt to state his understanding of the amendment. Petitioners emphasize Senator Bennett's statement that, under the amendment, "compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359.

Under fundamental principals of statutory construction, this sort of retrospective legislative history is entitled to little, if any, weight. See generally R. Dickerson, The Interpretation and Application of Statutes, 179-83 (Little, Brown 1975). In fact, Senator Clark, referring to these principles, subsequently dismissed Senator Bennett's ex post facto commentary as irrelevant.[17]

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[17] Senator Clark's remarks, in pertinent part, were as follows:

> "Mr. President, as all Senators know, legislative history cannot be written after the fact . . . . [T]he intent of Congress in enacting particular legislation must be discovered from the words of the enactment themselves, and through explanatory colloquy prior to the enactment if such is available, but never through explanations made on the Senate floor long after enactment."

111 Cong. Rec. 18263 (1965).

Whatever the propriety of examining subsequent legislative commentary, Senantor Bennett's remarks are more confusing than compelling. This is best illustrated in an excerpt from the staff memorandum on which he relied:

> Section 6(d) authorizes two things:
>
> 1. Wage differentials as between exempt male and female workers doing the same work; and
>
> 2. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity of production; or (iv) a differential on any other factor other than sex.
>
> The amendment therefore means that it is not an unlawful employment practice (a) to differentiate on the basis of sex in determining the compensation of white-collar and other employees who are exempt under the provisions of the Fair Labor Standards Act or (b) to have different standards of compensation for non-exempt employees when such differentiation is not prohibited by the Equal Pay Amendment to the Fair Labor Standards Act.

111 Cong. Rec. 18263 (1965).

The staff definition of "authorized" which Senator Bennett endorsed, supports the "four defenses" position. The Equal Pay Act authorizes sex-based wage discrimination among exempt employees doing equal work; it does not sanction discrimination among nonexempt parties doing nonequal work. This directly contradicts the conclusion that Title VII and the Equal Pay Act are coextensive. The memorandum further endorses the discredited view that the Equal Pay Act's exemptions apply to Title VII under the Bennett Amendment. Senator Bennett's retroactive commentary is inconsistent and inaccurate and should be disregarded.[18]

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[18] If the Court determines that subsequent legislative history is to be considered, the report of the Senate Committee on Human Resources on the 1978 Pregnancy amendments to Title VII clearly endorses the "four defense." That report reads, in relevant part, as follows:

IV. THE LIMITED ADMINISTRATIVE INTERPRETATION OF THE BENNETT AMENDMENT IS ENTITLED TO GREAT DEFERENCE.

The court of appeals' holding was consistent with administrative interpretation and application of the Bennett Amendment. In 1972, the EEOC issued supplemental guidelines on sex discrimination. The regulation defining the relationship of Title VII to the Equal Pay Act, 29

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18 (cont'd)

> [T]he Bennett Amendment . . . provides that if a practice is authorized by the Equal Pay Act, 29 U.S.C. § 206(c)--that is, if it is within one of the four enumerated exceptions to the Equal Pay Act--then it is not unlawful under Title VII.
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> * * * *
>
> It is the Committee's opinion that any application of the Bennett Amendment which assumes that the provision insulates from Title VII all compensation and fringe benefits programs which do not violate the Equal Pay Act is not correct . . . .

S. Rep. No. 95-331, 95th Cong., 1st Sess. 5, 11 (1977).

C.F.R. § 1604.8, provides, in pertinent part, as follows:

> (a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of other prohibitions contained in Title VII and is not limited by § 703(h) to those employees covered by the Fair Labor Standards Act.

37 Fed. Reg. 6836 (1972). Petitioners concede that this regulation reflects administrative endorsement of the "four defenses" construction but argue, under the authority of General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976), that the EEOC's interpretation should not be accorded deference.

In General Electric Co. v. Gilbert, supra, this Court gave little weight to a 1972 EEOC regulation which "flatly contradicted" an earlier agency position expressed in a General Counsel's letter, issued shortly after the enactment of Title VII. Gilbert's reasoning

does not apply in this case. The Commission's 1972 guidelines do not contradict its 1965 regulations, and since 1967, the EEOC has consistently interpreted the Bennett Amendment as incorporating only the Equal Pay Act's affirmative defenses.

The 1965 antecedent of 29 C.F.R. § 1604.8, formerly codified at 29 C.F.R. § 1604.7, read in relevant part as follows:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (Section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations in which both statutes are applicable. Accordingly, the Commission interprets Section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in Section 703, and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

30 Fed. Reg. 14928 (1965)(emphasis added). The language of the last sentence of this regulation is nearly identical to that of 29 C.F.R. § 1604.8(a).

Petitioners contend, however, that the second sentence of the regulation mandates incorporation of the equal work-equal pay standard, contradicting the 1972 guideline. They read this language in a vacuum. The regulation's introductory sentence emphasizes that Equal Pay Act standards are to control only in cases in which both statutes apply. The regulation does not, however, define that zone of statutory intersection. Certainly, it does not provide that only equal work discrimination claims are actionable under Title VII.

Petitioners point out, correctly, that on some occasions in 1965 and 1966, the EEOC, by implication, appeared to

adopt the "exclusive standard" interpretation of the Bennett Amendment.[19] However, agency opinions and decisions during that initial period also endorsed the "four defenses" position. In an opinion letter of October 12, 1965, described in a 1969 law review article, the EEOC's General Counsel stated that the Bennett Amendment:

> [M]erely incorporates by reference into Title VII the enumerated defenses set forth in the Fair Labor Standards Act (which were added to that act by the Equal Pay Act of 1963), together with such interpretative

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19 In addition to several opinion letters, petitioners cite a 1967 inter-office memorandum from the EEOC's acting general counsel to the director of the Albuquerque regional office. (Petitioners' Brief at 87-88.) That document was not an official statement of the Commission's policies, nor were the opinion it expressed subject to Commission approval. Accordingly, it is of no relevance here. See Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1200 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

> rulings thereon as the wage-hour administrator has made or may make.[20]

Similarly, the Commission in a 1968 decision holding that an airline practice of hiring only women as stewardesses and of terminating stewardess-employees after their thirty-second birthdays violated Title VII, noted that this holding was "analogous" to earlier decisions, including one issued in 1966, which proscribed sex-based discrimination in compensation for unequal work. Dodd v. American Air Lines, Inc., (June 20, 1968), 1973 EEOC Dec. (CCH) ¶ 6001.[21]

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20 See Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L. J. 305, 344-46 (1968).

21

> "An analogy may be drawn from Commission Decisions, finding discrimination based on race or sex where all the incumbents of a particular job classification are Negro or female and the wage rate for that

The Commission's pronouncements in 1965 and 1966 did not "flatly contradict" its subsequent position. Rather, agency policy duing this "shakedown" period was unsettled and ambiguous. After this initial uncertainty, however, the EEOC's interpretation of the Bennett Amendment was fixed. From 1967 on, Commission decisions applying the 1965 guidelines consistently endorsed the "four defenses" construction. The Commission's

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21 (cont'd)

> classification is suppressed as compared with comparable work performed by white or male employees in other job classifications or in other plants in the industry.
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> Commission Decision issued April 17, 1968, in case No. A U 7-3-173; and Commission Decision and Supplemental Decision issued on August 8 and September 16, 1966, respectively, in case Nos. 5-12-3175 through 5-12-3179."

1973 EEOC Dec. 4005, 4008-09 n.22.

observations in a 1971 opinion, holding that gender-related discrimination in compensating employees performing nonequal work violated Title VII, are illustrative:

> Section 6(g) of the Fair Labor Standards Act "authorizes" a pay differential for equal work when certain conditions are met. Here we are not concerned with a situation encompassed by the Equal Pay Act in that "equal work" is not involved.
>
> * * * *
>
> The above-quoted provision of Section 703(h) was intended to insure consistency in the administration of Title VII and the Equal Pay Act. Since the policy at issue here is not within the intended scope of the Equal Pay Act, it clearly cannot be "authorized" by that Act within the meaning of Section 703(h) of Title VII.

Dec. No. 71-2629 (June 25, 1969) 1973 EEOC Dec. (CCH) ¶ 6300. Accord, Dec. No. 70-695 (April 13, 1970) 1973 EEOC Dec. (CCH) ¶ 6148; Dec. No. 70-112 (September 5, 1969) 1973 EEOC Dec. (CCH) ¶ 6108. Again, these decisions were

under the "contradictory" 1965 regulation.

The EEOC's interpretation and application of the Bennett Amendment has been consistent and persuasive. It is entitled to "great deference". Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

V. THE NINTH CIRCUIT'S HOLDING IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners contend that the Court of Appeals' decision in this case is contrary to the law of five other circuits. Close examination of the cases, however, shows this "conflict" to be illusive, not real. Only two other courts have directly addressed the questions raised in this appeal, and their resolution of those issues parallels the Ninth Circuit's.

I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (4th Cir. 1980), petitioners concede, is consistent with

Gunther. There, the Third Circuit, citing Gunther favorably, concluded that there was no evidence that Congress intended the Bennett Amendment to so weaken Title VII "so as to authorize. . . explicit discrimination in compensation." 631 F.2d at 1107. The Tenth Circuit in Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (1980), construed Title VII similarly. The court reasoned that because the Bennett Amendment incorporated only the Equal Pay Act's affirmative defenses, plaintiff was not required to show equal work to recover for intentional wage discrimination under Title VII. 624 F.2d at 953-54 & n.2.

Two other courts of appeals have analyzed the Bennett Amendment and endorsed the "four defenses" construction, adopted by the Ninth Circuit. In Laffey v. Northwest Airlines, Inc., 567 F.2d. 429 (1976), cert. denied, 434 U.S. 720 (1978),

the District of Columbia Circuit explained its reasoning as follows:

> The legislative history of Title VII yields no hint that the guarantee of non-discriminatory compensation was extended only to minorities not embraced within the Equal Pay Act. Title VII refers specifically to the Equal Pay Act and states that a sex-predicated differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act.

567 F.2d at 446. More recently, the Fourth Circuit, citing Gunther, defined the relationship between the Equal Pay Act and Title VII in the following manner:

> Both the Equal Pay Act and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, protect workers against sexual discrimination in employment. The EPA, however, is more limited in its scope, applying only to claims of unequal pay for equal work based upon sex. Title VII is broader and affords a worker the opportunity to challenge other discriminatory compensation practices. Section 2000e-2(h) specially provides that the four exemptions in the EPA apply to actions brought pursuant to Title VII

> which claim sexual discrimination in wages or compensation paid or to be paid. See Gunther v. County of Washington, 602 F.2d 882, 888-91 (9th Cir. 1979).

EEOC v. Aetna Insurance Co., 616 F.2d 719, 724 n.5 (4th Cir. 1980).

Each of these opinions, by five courts of appeals, reflects careful, sometimes comprehensive, consideration of the Bennett Amendment, its history, and its implications. This is in direct contrast to the decisions which petitioners cite to support their claim that the Ninth Circuit's holding was contrary to the law of five circuits.

Four of the ostensibly conflicting cases which petitioners cite involved conventional equal pay claims brought under Title VII. DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1973); Calage v. University of Tennessee, 544 F.2d

297 (6th Cir. 1977); Orr v. Frank F. MacNeill and Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971). The courts in these cases implied in dicta that Title VII plaintiffs must meet the Equal Pay Act's requirements if they are to prevail in wage discrimination actions. These courts, however, had no need to consider--and did not consider--whether a wage discrimination claim based on a theory other than equal pay must satisfy the standards of the Equal Pay Act. Significantly, opinions in none of these cases even addressed the relationship between Title VII and the Equal Pay Act under the Bennett Amendment, the crucial element of the Ninth Circuit's analysis.

Inconsistency, if any, must be gleaned from either Lemons v. City and

County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 49 U.S.L.W. 3250 (U.S. Oct. 6, 1980), or Stastny v. Southern Bell Telephone and Telegraph Co., 628 F.2d 267 (4th Cir. 1980).

The plaintiff nurses in Lemons did not allege that the city had intentionally discriminated between its male and female employees. Instead, they sought relief under a comparable work theory, asserting that the city's classification and pay plan perpetuated historical gender-related inequities in compensation by fixing the compensation of public employees by reference to the pay for like work in the community. The plaintiffs argued that their position should be classified and their wages fixed, not by comparison with other nurses in the community, but by reference to non-nursing administrative positions within

the city. The Tenth Circuit rejected this comparable work approach.

Respondents in this case did not assert a comparable work concept. Nor did the Ninth Circuit's holding endorse such an approach. Instead, the court ruled that intentional wage discrimination is actionable under Title VII, a question not before the Lemons panel.[22]

Stastny v. Southern Bell is of uncertain significance. That case had many of the hallmarks of the equal pay-based decisions discussed above; indeed, Judge McMillan's opinion for the district court includes a heading titled "Back Pay on Account of Failure to Pay Women Equally for Equal Work." 458 F. Supp.

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[22] It is reasonable to assume that had this issue been presented in Lemons, the panel's holding would have conformed to the Tenth Circuit's earlier decision in Fitzgerald. Judge Holloway was a member of both panels.

314, 352 (W.D.N.C. 1978). However, the district court opinion also described wilfull and pervasive discrimination by the defendant. It is unclear whether plaintiffs asserted intentional discrimination as a basis for recovery, independent of their equal pay claim. Consequently, it is unclear from the Fourth Circuit's summary treatment of the individual plaintiffs' wage claims whether the court rejected intentional discrimination as a separate basis for recovery or simply held that the plaintiffs had not established the requisite equality of work for an equal pay claim under Title VII.[23]

Five courts of appeals have construed the Bennett Amendment narrowly.

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[23] It is significant that the Stastny opinion does not refer to the Fourth Circuit's earlier analysis of the Bennett Amendment in EEOC v. Aetna Insurance Company, supra.

None has a rejected a claim of intentional discrimination under Title VII because equal work was not proved. The Ninth Circuit's holding exemplified reasoned judicial interpretation of Title VII.

VI. THE COURT OF APPEALS' HOLDING IS MOST CONSISTENT WITH PRINCIPLES OF IN PARI MATERIA CONSTRUCTION.

Under the in pari materia canon of statutory interpretation, statutes which pertain to the same conduct are to be "harmonized." 2A J. Sutherland, supra, § 51.05. Petitioners repeatedly invoke this principle, asserting that it requires superimposition of the equal work standard onto Title VII. This contention is, however, doubly flawed. It is doubtful that Title VII and the Equal Pay Act are so related that in pari materia principles apply. Moreover, even if reference to those principles is appropriate, they

are most compatible with a "four defenses" construction of the Bennett Amendment.

Sutherland, in his treatise on statutory construction, defined the limited context in which the in pari materia canon applies:

> Statutes are to be considered in pari materia . . . when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object. As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to be the more important factor in determining whether different statutes are closely enough related to justify interpreting one in light of the other. For example, it has been held that where the same subject is treated in several acts having different objects the rule of in pari materia does not apply.

2A J. Sutherland, supra, § 51.05. Although the Equal Pay Act and the sex discrimination provisions of Title VII relate, generally, to the "same class of persons," their purposes and coverage

are very different. The two statutes, while enacted only a year apart, were products of different times and represent a response to different needs.

The Equal Pay Act of 1963 was, essentially, economic legislation, enacted as an amendment to the Fair Labor Standards Act. While legislative history reflects some discussion of intentional wage discrimination, the Act was not--and did not purport to be--a comprehensive anti-discrimination measure.[24] Most significantly, the Act prohibited simple "differentiations," not discrimination, in wage

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24 In Corning Glass Works v. Brennan, 427 U.S. 188 (1974), the Court described the economic rationales for the Equal Pay Act as follows:

> The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition."

payments. Discriminatory intent need not be proved in an Equal Pay Act action. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

Petitioners make much of congressional refusal to adopt the "comparable work" standard in the Equal Pay Act. This is not so significant as it might seem. Congress rejected the "comparable work" formulation for a number of reasons, including concern that because of the standard's flexibility, women workers

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24 (cont'd)

417 U.S. at 207 (citation omitted). Cf. 109 Cong. Rec. 9193 (1963) (remarks of Rep. St. George) (Equal Pay Act "the first step in the right direction"). See S. Rep. No. 176, 88th Cong., 1st Sess. 2 (1963); H.R. Rep. No. 309, 88th Cong., 1st Sess. 2-3 (1963).

would not be adequately protected.[25] It must also be emphasized, that to the extent Congress was concerned with the implications of free-wheeling job comparison, that concern focused on legislation which imposed liability upon a simple showing of differentiation. Congress did not, in 1963, consider or resolve the problem of intentional discrimination in compensation for non-equal work.

Discrimination, not differentiation, was the object of the Civil Rights Act of 1964. The most comprehensive civil

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[25] The comments of Representative St. George, who in 1962 introduced the original amendment substituting "equal" for "comparable," reflect this concern. 108 Cong. Rec. 14767, 14770 (1962). See Gitt and Gelb, supra, at 738-39. In introducing her amendment, Representative St. George was not, however, endorsing a narrow standard of equality. "Equal work," when initially added to the 1962 equal pay legislation, had a much broader meaning than the "substantial similarity" definition which the courts subsequently developed. Id. at 740-41. See 109 Cong. Rec. 9761 (1963) (remarks of Sen. McNamara).

rights measure of this century, it epitomized a new national consciousness and commitment prompted, perhaps accelerated, by the events of the summer and fall of 1963.

The Civil Rights Act differed from the Equal Pay Act not only in purpose and historic context, but also in coverage and procedure. Title VII's coverage was much broader than the Equal Pay Act's; its exclusions, much more limited.[26] The statutes also describe different exhaustion requirements,[27] and different mechanisms for recovery of

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26 See pages 41-43, supra.

27 Compare 42 U.S.C. § 2000e-5(f)(1) (1976) (plaintiff must file complaint with EEOC for 180 days and secure agency approval before instituting action in federal court) with 29 U.S.C. § 216(b) (1976) (Equal Pay Act action may be filed immediately in federal or state court).

back pay.[28] Most importantly, for purposes of this appeal, a plaintiff raising a claim of disparate treatment under Title VII must, unlike an Equal Pay Act claimant, prove discriminatory intent. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

The historical, substantive, and procedural differences between the Equal Pay Act and Title VII are so significant that principles of in pari materia are inapposite. If, however, that canon of construction is germaine, it lends additional support to the "four defenses" position.

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28 Compare 29 U.S.C. § 216(c) (1976) (recovery period of three years for willful violation of Equal Pay Act) with 42 U.S.C. § 2000e-5(g) (1976) (recovery period limited to two years prior to date charges filed with EEOC). See 29 U.S.C. § 216(b) (1976) (allowing double back pay awards, permitting recovery of liquidated damages in amount equal to back pay).

Under precepts of in pari materia, "[w]here there is no clear intention otherwise, a specific statute will not be construed or nullified by a general one, regardless of the priority of enactment." Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976) quoting Morton v. Mancari, 417 U.S. 535, 550-51 (1974). This does not require a coterminous construction of similar statutes. Rather, such statutes "should be harmonized, if possible." J. Sutherland, supra, § 51.03.

The "four defenses" construction of the Bennett Amendment is most consistent with these goals. Contrary to petitioners' contention that this reading would "nullify" the Equal Pay Act, the Equal Pay Act would continue to have independent signficance, affording relief for employees who are unable to prove discriminatory intent but who can demonstrate substantial

similarity of work. Conversely, under petitioners' construction of the Bennett Amendment, the Equal Pay Act is either nullified or Title VII's wage discrimination provisions become essentially meaningless. If the equal work standard governs gender-based wage discrimination actions under Title VII, then the Equal Pay Act is swallowed whole by Title VII; its exemptions are drowned by Title VII's broader coverage, and its prophylactic, simple differentiation approach falls victim to Title VII's requirement of proof of discriminatory intent. If, on the other hand, the Equal Pay Act's exemptions and "differentiation" standard apply to Title VII, Title VII's wage discrimination provisions are an echo, superfluous and meaningless.

Congress cannot have intended such a result. It created a range of

remedies, complementary and overlapping measures which are to be broadly construed to eradicate "a historic evil of national proportions." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).[29] Congress cannot have intended to sanction intentional discrimination. Congress did not discriminate against women within the provisions of Title VII.

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29 In direct contrast to this system of supplementary remedies, were the conflicting statutes in United States v. United Continental Tuna, 425 U.S. 164 (1976), which petitioners cite. There, both the Public Vessels Act and the Suits in Admiralty Act purported to provide the exclusive remedy for claims within their coverage.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the opinions and order entered by the United States Court of Appeals for the Ninth Circuit in this matter be affirmed.

Respectfully submitted,

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APPENDIX

1. Section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976), reads as follows:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or;

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Section 703(h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(h) (1976), reads as follows:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations,

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

3. The Equal Pay Act of 1963, 29 U.S.C. § 706(d)(1) (1976), reads as follows:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or

(iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.